

SOME PROBLEMS ASSOCIATED WITH THE APPLICATION OF COPYRIGHT LAW WITHIN THE MUSIC INDUSTRY

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Abstract

This work examines the historical, philosophical and legal particulars relating to copyright law and intellectual property as an intangible work, as well as, the practical application of those rights with emphasis on the particular effects of computerisation and the emergence of the internet on the business results of the music industry. A question is raised as to whether it is businessly ethical for a legal entity to accrue considerable material gain as the result of illegal usage of copywritten material.

JEL classification: K10, K21

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1. POINTS OF INTRODUCTION

You shall not steal.
Exodus 20,2-17

Copyright law (auctor, lat. - multiplier, creator, author) is a branch of law relating to the protection of authors, which emerged in the 18th century. The first privileges were recognised at the onset of the printing press (Venice 1469; French-decree King Franje I, 1521; England 1556, decree of Queen Mary Tudor; U.S.A. 1790; Prussia 1794; Italy 1801; Russia 1830; Austrian Empire 1846). The law of the Austrian Empire of 1895, applied to Dalmatia, and the Hungarian-Croatian law of 1884, applied to Croatia and Slavonia. The first Yugoslavia did not have such a law until 1929, whereas post-war regulation of this material was effected by the laws of 1946, 1957, 1968 and 1978. In 1967, the Convention for the creation of the World Intellectual Property Organisation (WIPO) was adopted, and in 1996, that organisation passed its most important document, the Contract for Copyright Law. That Contract was ratified by the Republic of Croatia in 1997 (Horvat 2006).

The Constitution of the Republic of Croatia, article 68, states, "Freedom of scientific, cultural and artistic creation is guaranteed. The country shall

encourage and aid in the development of science, culture and art. The country protects scientific, cultural and artistic works as material of sacred national value. Guaranteed are the protection of moral and material rights which emanate from scientific, cultural, artistic, intellectual and other productions. The country encourages and aids in the management of physical culture and sport." (Croatian Constitution, Official Gazette, NN, 1993: 68) On the basis of that article, the Republic of Croatia as early as June 2, 1993, passed the Decree of the declaration of the Act relating to the amendment and supplement of the Law of Copyright Law (Official Gazette, NN 58/93), subsequently, in 1999, the Act of Copyright Law (revised text), and in 2003, the Act of Copyright Law and Related rights (Official Gazette, NN 167/03) in conjunction with the Act amending and supplementing the Act of Copyright Law and Related Rights (Official Gazette, NN 79/07) of 2007. Writing in regard to the problems related to the protection of copyrights, Josipović (2004, vol. 5:67-96), and referring to that last, valid Act, contends that statistical data clearly present a marked increase of legal proceedings against those who have breached copyright law. A great majority of processed violations relate to infringement upon the rights of authors of musical works as set forth in article 125, paragraph 1, line 4, ZAP. Although in practice other violations are encountered (especially relating to article 125, paragraph 1, line 5 and article 126, line 6, ZAP), it may be construed that almost all positive and negative sides of the violation- legal regime protect copyrights, not only in respect to the former, but also as regards the latest violation-legal regime, as cited in article 125, paragraph 1, line 4¹ and the related article 189, paragraph 1, line 2, from the recent ZAPSP. Additionally, article 32 of said act insures the author of a work the right to adequate compensation, and the aforementioned article 125, provides said author with the exclusive right to reproduce, distribute, rent, publish and/or otherwise place it at public disposal.

Consequently, historically and legally, there exists available sources which cultivate material relating to copyright law. Essential to understanding that law are two facts. First, that there exists tangible and intangible property or works. Intangible are those products of human intellect which represent property of the creator, in other words, under certain conditions, intellectual property. Although that work, respectively property is intangible in a physical sense, it possesses all characteristics of property, so that it may be bought, sold,

¹"A legal entity shall be fined a sum of between 5,000.00 kn and 50,000.00 kn if (...) 4) without the author's permission or another with whom is vested the author's rights or authors' society or other legal entity specialised in the protection of authors' rights, according to article 90, paragraph 1, of this Law, when said permission is required, or, against their explicit prohibition, publishes, reproduces or multiplies, imports or distributes original or multiplied copies of the work, presents, performs, records, broadcasts, communicates by way of public media means, translates, adapts, elaborates or processes in any other way an author's work or exploits the work in any other way (article 30), (...)." On the basis of paragraph 2, for the violation of paragraph 1, the responsible executive of the legal entity shall also be fined with the same sum, with an individual who commits the same violation being fined between 1,000.00 and 5,000.00 kn.

licenced, traded, gifted or inherited such as is all other property. Naturally, the exploitation of intellectual property, as in the case of the trade of any other product, may generate revenue and furthermore, that property enjoys all rights regarding its protection as does tangible, material property. The second fact is that a distinction must be made between public and personal rather, personal or private use from the domain of intellectual property.

Writing about similar notions as early as 1797, Kant explains what constitutes a book: "A book is a written document(pen written or printed, on a few or many pages, here it is all the same) which represents a speech that someone by known linguistic signs presents to an audience. -The one who speaks in his own name is called the author. The one who by way of that written document publicly communicates in someone elses name (author) is a publisher. If the publisher communicates with the permission of the author, he is to be considered a legal publisher, however, if he acts without the author's permission it is deemed illegal, i.e. a plagiarist." (Kant, 1999:82) Furthermore, in his discussion on the illegal copying or plagerism theme, Kant writes:"The cause for such an injustice such as

2. CONSEQUENCES ARISING FROM THE APPLICATION OF COPYRIGHT LAW IN THE MUSIC INDUSTRY

The thought of 212 years ago may, because it related to the same law, be applied to the concept of CD's with music content. By purchasing a legal CD, one pays, for the right of ownership of that particular CD as a physical thing, which from the moment of purchase one owns, and therefore, can use for their personal benefit. Additionally, that same purchase endows the purchaser with limited permission of the author to reproduce the content of the CD in a private environment, and for private use. Physically, that CD can be disposed of, used as a coaster, gifted or be exploited in any such other way as are any other physical objectects found in one's possession, except that one may not publicly reproduce or otherwise multiply the CD for purposes of further distribution, for that right has not been purchased. The contents of a sound recording may not be purchased for any other purpose, except for private listening enjoyment in one's private environment. Simply, the CD is yours, but the songs recorded on it are not. Those songs are the sole ownership of the author who regulates their exploitation through various contracts, with the understanding that the author continuing to enjoy ownership as would any other property owner. The author lends, or better said rents the songs. Such renting occurs for the duration of the author's life and 70 years after his death, with some countries recognizing a post-mortem period of up to 120 years. It should be observed that, when music is in question, the law protects the performers' rights, or rather, the person or persons who have performed the piece, the sound recordings' publisher, or rather, that recordings' owner(s) for they have financed and distributed the material (mostly, recording companies).

Historically, until the beginning of the XVIII century, development of the simplified music industry consisted of the composition and printing of music, with the predominant work having been done by the aristocracy and the church. It was then that composers such as Wolfgang Amadeus Mozart began to gradually commercialize their music and performances. In the XIX century, music distribution continued by way of music scores and "music boxes" which reproduced music using cylinders. It is important to note that the gramophone was invented on March 3, 1887. On that date, the French Academy accepted the patent of Charles Cilios, which encompassed the entire system for recording and reproducing sound, the paleofon, which read markings made on a soot covered surface by a vibrating membrane. The markings were then photographed onto a metal or copper plate where sound reproduction was instigated by a vibrating membrane like the one used in the beginning of the process. In 1888, one year later, at the Franklin Institute in Philadelphia, German born Emile Berliner, presented a machine with a crank handle which reproduced sound off of a plate. He called it a gramophone, and it was to be used for entertainment purposes (Horvat 2004). It wasn't until the XX century, precisely in 1925, at Leipzig's fair that a German company "Odeon" introduced the double-sided gramophone record which reproduced 3,5 minutes of sound. That same year, in the U.S.A., experiments involving electronic recording were conducted, with the first such recordings having been released by the "Columbia" and "Victor" companies. The first record companies appear and begin mass production of records, providing everyone with accessible consumption of music.

After the introduction of vinyl and singles, LP-records soon appeared, mono sound switched to stereo, with the music cassette (MC) following. In fact, the cassette provided consumers with an even greater music enjoyment while in motion (automobile - auto cassette player, walking - *walkman*) where the choice of music, unlike listening to the radio, was left to the listener, and not a music editor. For the first time consumers, thanks to the possibility of recording onto a cassette, could manipulate the recording on their own. It was a time of analog recording and reproduction. The 1980's of the XX century, as a result of the development of digital technology and rapid informatisation have brought great changes to the music industry, and that process continues to today. The greatest change was effected by the Internet which by definition as provided by one of its sites, "publicly available global packaged information web which ties together the computer and the computerised web using the same named protocol (internet protocol). It is the web of all webs which consists of millions of household, academic and government webs which exchange information and services between themselves, such like electronic mail, chat and data delivery, thereby linking sites and documents via the *World Wide Web*."²

An internet search on Google for the Croatian word "glazba" results in a listing of approximately 6,510,000 sites. The English translation "music" offers

² Source of data: <http://hr.wikipedia.org/wiki/Internet>, (accessed June 24, 2008)

2,270,000,000 sites of music contents, while the german "Musik" provides for a solid 251,000,000 site listings. Consequently, searches covering only three languages result in more than two and one-half billion results. In comparison, similar searches of the word "sex" which is spelled identically in most languages, provides "only" 728,000,000 sites or 3.5 times less hits. In continuation of this little experiment, "besplatna glazba" gives 441,000 results, "free music download" 258,000,000, and "gratis Musik" 1,170,000. The term "free children's medicines" provides a result of 37,900, and free toothpicks" 2,250 sites. Legally and ethically the results should, when comparing free music against free children's medicines be not 441,000:37,900 in favor of music , but at least 37,900:0 in favor of children's medicine. Music is someone's property, and in our society as we have seen from the recognised positive law, no one has the right to offer another's private property and/or dispose of it without the consent of the owner. Article 48 of the Croatian Constitution guarantees the right of ownership (Croatian Constitution, Official Gazette, 1993: 26). Legally, music belongs to someone. Legally it is someones. In the First part of legal doctrine - Private rights, Immanuel Kant speaks to the idea of possession: Legally mine (meum iuris) is that with which I am bound so that it would injure me should someone exploit that which is mine without my consent. A subjective condition for the possibility of general exploitation is possession" (Kant, 1999: 41).

Aside from the legal and philosophical theories, the modern business approach proposes the ideas of business ethics as an important factor in modern business transactions. " Business ethics are a special branch of ethics which are understood to apply ethical and moral values to business actions, and which appeared in the U.S.A. during the 1960's, while the Republic of Croatia began such application in the 1990's. The foundation of business ethics is a behaviour in accordance with the law."³ The Cratian Chamber of Commerce passed its "Code of Ethics in Business"⁴ which generally states, in paragraph 4, that all signatories are called upon to "...accept the obligation of acting in accordance with the principles of responsibility, truthfulness, efficiency, transparency, quality, good faith and with respect for good business practice towards business partners, business and community environment as well as, one's own employees. All business subjects shall abide by the current law respecting the principals of ethics in business practices." As of March 25, 2009, 616 croatian companies have signed this document.

³ Source of data: <http://www.liderpress.hr/Default.aspx?sid=40566>, (accessed March 25, 2009)

⁴ Full text available from:

http://www2.hgk.hr/komora/hrv/homepage/kodeks_poslovne_etike/Kodeks_poslovne_etike.pdf
(accessed
March 25, 2009)

Since the definition and the Code provide a general and relatively wide explanation as to what business ethics should be, we must search for a interpretation of that particular phrase. Business ethics, by virtue of the adjective business "...that which is in connection with business, which relates to business..." (Anić, 1994: 724) and the noun ethics (croatian morals) which again "the cultivation of moral principals(morals) conduct of a society or societal group which is based on those basic catagories of social values such as: goodwill, honesty, duty, truth, humanitianism etc. ..." (General Encyclopedia, 1977:619), shows the need for the introduction of moral normatives in business to counter the hard business interests of profit and economic growth, if it is at all possible to act ethically in today's business environment. Even if we know nothing of business ethics, and just respect elementary principals of good breeding and manners with which we live, we can say that we are honest and that we surely act ethically at least in part, if we respect others, their property and interests. Therefore, as a matter of course, it follows that respect for another's property is a integral part of business ethics.

The premise to which this text speaks, imparts that:

- a great number of material exists which illegally offer free music on internet sites
- there exist a legal presumption that the use of any sort of another's property, and especially copyrights, is forbidden and subject to prosecution
- numerous historical evidence concerning the regulation of authors' rights and recognition of the same, even as far back as the long past
- philosophical discussions which prove that the unauthorised use of another's intellectual property is illegitimate and unethical
- the existance of business ethics as a necessary and unavoidable standard to be applied to the actions of business subjects.

Creative or artistic realisation of an idea, which is the product of human intellect, belongs to its creator, while the right of intellectual ownership encompasses a system of legal instruments which regulate the accrument of such rights and the means of protections against its unauthorised use.

In a business sense, intellectual property represents intangible property whose successful exploitation may be a valuable business foundation (State Intellectual Property Office of the Republic of Croatia, 2008). The damage suffered by the music industry as a result of the emergence of the Internet are enormous. The IFPI (abb. International Federation of the Phonographic Industry) has posts official global figures for each year and are presented in table 1.

Table 1. IFPI official figures relating to the global sale of sound recordings (2000-2007)

year	amount sold	retail value in US\$
2000.	3.500.000.000	36.900.000.000,00
2001.	3.200.000.000	33.700.000.000,00
2002.	3.000.000.000	32.000.000.000,00
2003.	2.700.000.000	32.000.000.000,00
2004.	2.750.000.000	33.600.000.000,00
2005.	--	33.000.000.000,00
2006.	--	31.800.000.000,00
2007.	--	29.900.000.000,00

Source: <http://www.ifpi.org> (2008)

Apparent is the downward trend of the entire revenue generated by the music industry, which in 2007, was 19% less than in the year 2000.

Obviously it is socially and culturally unacceptable, as well as, businessly unethical and subject to legal prosecution to make use of another's property without the consent of the owner and making adequate compensation for the same. However, the Internet is abundant with sites on which legal and physical persons offer that which is not their property to offer. Legal how-to manuals (i.e. Buckley and Clark, 2007) are sold in which directly or indirectly, refer to the existence of such sites. What sort of business ethics are applied by the owners of such internet domains where another's property is offered without compensation? Recently, the print media has written about the accrued wealth of the owners of Google: "The co-owners of Google, Sergey Brin and Larry Page are the richest young billionaires, even though their company stock has fallen in value by 30% in the past year" Šerić, 2009: 12). That article illustrates the general superficial attitude of the media when ethics are in question.

3. CONCLUDING THOUGHTS

Answers to this question present that the value system of our age is disturbed. If the media writes a piece which fails to acknowledge the rights of authors to protection, if the Croatian Hotel Association sends its members a memorandum advising the same not to pay author fees⁵, and if on bookstore shelves exist a publication which shamefully speaks to the ethical problems associated with the illegal use of music, they all being business subjects which when choosing their employees and management practices should respect the principals of business ethics or at least ethics, something is not as it should be. Once again practice has fallen short in relation to theory. Finally, we have seen that as of March 25 of this year, 616 croatian companies have signed the "Code of Business

⁵ On March 16, 2009, the president of the executive committee and the presidential body of HUH, Franco Palma, sent all members a memorandum in which he writes: "...We suggest that you temporarily stop payment of debt obligations to HDS-ZAMP..."

Ethics", of the Croatian Chamber of Commerce. Considering the Monthly Statistical report of the State Statistic Authority and applying the 2007 classifications of the NKD⁶, since January 31, 2009, in the Republic of Croatia, 263,658 legal persons have been registered, with 121,837 listed as active, and 128,37 commercial entities have been registered with 97,656⁷ listed as active, it is not hard to conclude that the code has been accepted by only 0.63% of all active registered commercial associations. When looking at the relationship of the total number of registered legal persons, then only 0.23% of that category consider the principal of business ethics in Croatia.

If ethical conduct could be reduced to the phrase "do unto others as you would have them do unto you", and "a thief is the one who holds the ladder", then one may conclude that although legal solutions exist, as do the mechanisms for their execution, their response to the theft of an author leaves much to be desired. If nothing else, then a guideline of conduct could be one of the Ten Commandments cited at the beginning of this text. Obviously, such a disbarment of value judgement, needs to be afforded a great deal of thought by the legislature, court system, police and society as a whole.

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⁶ The National classification of activities defines the areas, sub-areas, sections, groups, classes and sub-classes of economical and other activities, as regulated by the government of the Republic of Croatia.

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